

Notice of Decision and Reasons for Decision

Applicant:	'AY2'
Agency:	Melbourne Health
Decision Date:	27 December 2019
Exemptions considered:	Sections 33(1), 35(1)(b)
Citation:	'AY2' and Melbourne Health (<i>Freedom of Information</i>) [2019] VICmr 219 (27 December 2019)

FREEDOM OF INFORMATION – medical records – health service – information provided to agency in confidence – disclosure contrary to the public interest – impair agency's ability to obtain similar information in the future

All references to legislation in this document are to the *Freedom of Information Act 1982* (Vic) (**FOI Act**) unless otherwise stated.

Notice of Decision

I have conducted a review under section 49F of the Agency's decision to refuse access to documents requested by the Applicant under the FOI Act.

My decision on the Applicant's request differs from the Agency's decision in that I have decided to release additional information in the document.

The Schedule of Documents in **Annexure 1** sets out my decision in relation to each document.

My reasons for decision follow.

Joanne Kummrow
Public Access Deputy Commissioner

27 December 2019

Reasons for Decision

Background to review

1. The Applicant made a request to the Agency for access to the following documents:
 1. All records for myself from [date] to [date]
 2. All documents and forms presented to [the] Mental Health Tribunal [in] [month]/[month] [year]
 3. All information available at [hospital unit and ward name] ...
2. In its decision, the Agency identified a 266 page document falling within the terms of the Applicant's request, being the Applicant's medical record, and granted access to the document in part.

Review

3. The Applicant sought review by the Information Commissioner under section 49A(1) of the Agency's decision to refuse access.
4. On 1 August 2019, the Applicant advised OVIC staff they do not seek the personal affairs information of third parties, such as names and position titles. Accordingly, this review relates to information exempted by the Agency under section 35(1)(b) only.
5. The Applicant and the Agency were invited to make a written submission under section 49H(2) in relation to the review.
6. I have considered all communications and submissions received from the parties, including:
 - (a) the Agency's decision on the FOI request, dated 3 July 2019;
 - (b) information provided with the Applicant's review application and submissions dated 1 August, 8 September, 26 October and 17 November 2019; and
 - (c) correspondence between OVIC staff and the Applicant and Agency during the review.
7. In undertaking my review, I have had regard to the object of the FOI Act, which is to create a general right of access to information in the possession of the Government or other public bodies, limited only by exceptions and exemptions necessary to protect essential public interests, privacy and business affairs.

Review of exemptions

8. The Agency relies on the exemption under sections 33(1) and 35(1)(b) to refuse access to parts of the document. The Agency's decision letter sets out the reasons for its decision. As requested by the Applicant, the scope of the review has been narrowed to information exempted under section 35(1)(b).

Section 35(1)(b)

9. In summary, section 35(1)(b) is concerned with protecting the public interest in the free flow of information provided in confidence between a third party and an agency.

10. A document is exempt under section 35(1)(b) if two conditions are satisfied:
- (a) disclosure would divulge information or matter communicated in confidence by or on behalf of a person or a government to an agency or a Minister; and
 - (b) disclosure would be contrary to the public interest as it would be reasonably likely to impair the ability of an agency or a Minister to obtain similar information in the future.

Was the information or matter communicated in confidence?

11. When determining whether information was communicated in confidence, it is necessary to consider the position from the perspective of the communicator.¹ Further, confidentiality can be expressed or implied from the circumstances of the matter.²
12. Having reviewed information exempted by the Agency under section 35(1)(b), I am satisfied most information was communicated to the Agency in confidence. This view is based on the sensitive nature of the information and the circumstances and purpose for which it was provided by a third party to the Agency. Further, most information was voluntarily provided to the Agency, by a person or persons, in the course of the Agency providing medical treatment to the Applicant.
13. However, I do not consider the following information was communicated to the Agency in confidence:
- (a) Page 83, next to the margin heading '[date], [time]' lines 1 to 4 (inclusive). I consider this information is a record made by an Agency officer when undertaking their usual work duties with respect to the Applicant's care.
 - (b) Page 84, next to the margin heading '[date], [time]' lines 1 to 5 (inclusive). I consider this information is a record of an Agency officer's observations when undertaking their usual work duties with respect to the Applicant's care.
 - (c) Page 224, under the heading 'From the ED Consultant MO' information from the 9th word in the 4th line. I consider this information is a record of a discussion with the Applicant and contains the Agency officer's observations.
 - (d) Page 224, under the heading 'Formulation (including Risk Factors)':
 - (i) all information in the 4th line. I consider this information is a record of an Agency officer's summary of events leading to the Applicant's hospital admission;
 - (ii) the 23rd and 24th words in the 5th line. This information regards the Applicant's admission to hospital; and
 - (iii) all information in the 6th line. I consider this information is a record of a discussion with the Applicant.

Would disclosure be contrary to the public interest as it would be reasonably likely to impair the ability of the Agency to obtain similar information in the future?

14. The second condition that must be met before section 35(1)(b) is disclosure of the information would be contrary to the public interest as it would be reasonably likely to impair the ability of the Agency to obtain similar information in the future. For example, others in the position of the communicator would be reasonably likely not to provide similar information to the Agency in the future.

¹ *XYZ v Victoria Police (General)* [2010] VCAT 255 at [265].

² *Ibid.*

15. I accept information relating to medical treatment and healthcare received by a patient from the Agency, by its very nature, will generally be personal and sensitive.
16. I am satisfied there is an essential public interest in individuals being able to provide information of this nature to the Agency.
17. Where it is beneficial or necessary for information to be disclosed to the Agency, I am of the view individuals should feel confident information they provide, including their identity or identifying information, will be held in confidence by the Agency.³ If individuals were aware their identity and information provided in confidence were to be routinely disclosed in response to an FOI request, they would be less likely to communicate similar information to the Agency in the future. I consider this would be a significant and detrimental outcome for the Agency, which relies on receiving such information to provide timely and necessary medical treatment and health services to patients.
18. In the context of the Agency being a healthcare provider, the voluntary provision of personal and sensitive information in a clinical context is necessary for the Agency to be able to effectively discharge its medical and healthcare functions. Importantly, withholding such information from the Agency would have a detrimental impact on the medical outcomes and wellbeing of its patients.
19. I acknowledge the Applicant has a strong interest in obtaining full access to their medical records. However, having balanced the above considerations, I am of the view the need to protect personal and sensitive information provided by a person or persons to the Agency in confidence for a clinical purpose and in the best interests of its patients, outweighs the Applicant's personal interest in obtaining the information.
20. However, having reviewed page 247, whilst I accept the information was provided to the Agency in confidence, I am not satisfied the communicator would be less likely to provide all exempted information in the future should this document to be released. This record keeping appears to form part of their professional duties. However, I am of the view the release of page 247 would disclose the personal affairs information of a third party. Therefore, while I note the Applicant excluded personal affairs information from the scope of the review, for completeness, I will consider the exemption under section 33(1) to this page below.
21. Accordingly, except for the pages listed above in paragraph 13, I am satisfied all information deleted by the Agency under section 35(1)(b) is exempt.
22. The Schedule of Documents in **Annexure 1** sets out my decision in relation to each document and section 35(1)(b).

Section 33(1)

23. A document is exempt under section 33(1) if two conditions are satisfied:
 - (a) disclosure of the document under the FOI Act would 'involve' the disclosure of information relating to the 'personal affairs' of a person other than the Applicant;⁴ and
 - (b) such disclosure would be 'unreasonable'.

³ See *Maki v Alfred Hospital*, unreported, VCAT, Davis M, 19 April 2002.

⁴ Sections 33(1) and (2).

Do the documents contain the personal affairs information of individuals other than the Applicant?

24. Information relating to a person's 'personal affairs' includes information that identifies any person, or discloses their address or location. It also includes any information from which this may be reasonably determined.⁵
25. A third party's opinion or observations about another person's conduct can constitute information related to the third party's personal affairs.⁶
26. 'Personal affairs information' is interpreted broadly to include matters related to the health, private behaviour, home life or personal or family relationships of individuals.⁷
27. Page 247 includes the name, position title, opinion, observations and actions of a third party. I am satisfied this is the personal affairs information of an individual other than the Applicant. Therefore, I must consider whether disclosure of such information would be unreasonable in the circumstances.

Would the release of this personal affairs information be unreasonable?

28. Consideration of whether disclosure of personal affairs information would be unreasonable involves balancing the public interest in the disclosure of official information with the personal interest in protecting the privacy of a third party in the circumstances of a matter.
29. Having reviewed the information on page 247, I have given weight to the following factors:

(a) The nature of the personal affairs information

The nature of the personal affairs information is the name, position title, opinion, observations and actions of a third party. The information is sensitive in nature as it relates to the third party's personal experience of a situation. This factor weighs against disclosure.

(b) The circumstances in which the information was obtained

I acknowledge Agency officers, who are registered health practitioners, are required to record their opinions, observations and actions in medical records when treating a patient. While this information relates to the Applicant in part, I consider the information also records an Agency officer's actions concerning an issue unrelated to the Applicant's medical treatment and healthcare. As noted above, the Agency officer would be reasonably likely to be required to record this information as part of their professional duties. However, having considered the nature of the information, I am of the view the author would not have expected this information would be disclosed through the FOI process. This factor weighs against disclosure.

(c) Whether the individuals to whom the investigation relates object, or would be likely to object, to the release of information

Having reviewed page 247, I am of the view the author would be reasonably likely to object to the disclosure of their personal affairs information. This factor weighs against disclosure.

⁵ Section 33(9).

⁶ *Richardson v Business Licensing Authority* [2003] VCAT 1053, cited in *Davis v Victoria Police (General)* [2008] VCAT 1343 at [43], *Pritchard v Victoria Police (General)* [2008] VCAT 913 at [24], *Mrs R v Ballarat Health Services (General)* [2007] VCAT 2397 at [13].

⁷ *Re F and Health Department* (1988) 2 VAR 458 as quoted in *RFJ v Victoria Police FOI Division* [2013] VCAT 1267 at [103].

- (d) Whether disclosure of the information would, or would be reasonably likely to, endanger the life of physical safety of any person

Section 33(2A), requires, in deciding whether the disclosure of a document would involve the unreasonable disclosure of information relating to the personal affairs of any person, I must take into account whether disclosure would, or would be reasonably likely to, endanger the life or physical safety of any person. Having considered the circumstances of this matter, I am unable to discount this as a relevant factor. Accordingly, this factor weighs against disclosure.

30. Having considered the above factors, I am satisfied disclosure of the personal affairs information of third parties in the document would be unreasonable in the circumstances and the relevant information on page 247 is exempt under section 33(1).
31. The Schedule of Documents in **Annexure 1** sets out my decision in relation to each document and section 33(1).

Deletion of exempt or irrelevant information

32. Section 25 requires an agency to grant access to an edited copy of a document when it is practicable for the agency or Minister to delete exempt or irrelevant information and the applicant agrees to receiving such a copy.
33. Determining what is 'practicable' requires consideration of the effort and editing involved in making the deletions 'from a resources point of view'⁸ and the effectiveness of the deletions. Where deletions would render the document meaningless they are not 'practicable' and release of the document is not required under section 25.⁹
34. In relation to pages 83, 84 and 224, I am satisfied it is practicable to delete exempt information from the documents as to do so would not require substantial time and effort, and the edited documents would retain meaning. However, I do not consider it would be practicable to delete exempt information from page 247, as to do so would render the page meaningless.

Conclusion

35. On the information before me, I am satisfied certain information in the documents is exempt under sections 33(1) and 35(1)(b). As it is practicable to delete certain exempt information in the documents, I have determined to grant access to some pages in part, and refuse access to one page in full where deletion of exempt information would not be practicable.
36. The Schedule of Documents in **Annexure 1** contains a summary of my decision with respect to each page subject to review.

Review rights

37. If either party to this review is not satisfied with my decision, they are entitled to apply to VCAT for it to be reviewed.¹⁰
38. The Applicant may apply to VCAT for a review up to 60 days from the date they are given this Notice of Decision.¹¹

⁸ *Mickelborough v Victoria Police (General)* [2009] VCAT 2786 at [31]; *The Herald and Weekly Times Pty Limited v The Office of the Premier (General)* [2012] VCAT 967 at [82].

⁹ *Honeywood v Department of Human Services* [2006] VCAT 2048 at [26]; *RFJ v Victoria Police FOI Division (Review and Regulation)* [2013] VCAT 1267 at [140] and [155].

¹⁰ The Applicant in section 50(1)(b) and the Agency in section 50(3D).

39. The Agency may apply to VCAT for a review up to 14 days from the date it is given this Notice of Decision.¹²
40. Information about how to apply to VCAT is available online at www.vcat.vic.gov.au. Alternatively, VCAT may be contacted by email at admin@vcat.vic.gov.au or by telephone on 1300 018 228.
41. The Agency is required to notify the Information Commissioner in writing as soon as practicable if either party applies to VCAT for a review of my decision.¹³

When this decision takes effect

42. I have decided to release information the Agency exempted under section 35(1)(b).
43. Therefore, I am required to notify relevant third parties of my decision¹⁴ and their right to apply to VCAT for review of my decision within 60 days from the date they are given notice of this decision.¹⁵
44. For that reason, my decision does not take effect until the 60 day period expires. If a review application is made to VCAT, my decision will be subject to any VCAT determination.

¹¹ Section 52(5).

¹² Section 52(9).

¹³ Sections 50(3F) and (3FA).

¹⁴ Section 49P(5).

¹⁵ Section 50(3AB).

Document No.	Date of Document	Document Description	Number of Pages	Agency's Decision	OVIC Decision	OVIC Comments
1.	Various	Medical Records	266	Released in part Sections 33(1) and 35(1)(b)	<p>Release in part</p> <p>Section 33(1) and 35(1)(b)</p> <p>A) The information exempted by the Agency under section 35(1)(b) is to remain deleted from the following pages;</p> <ul style="list-style-type: none"> • Page 2 • Page 55 • Page 56 • Page 59 • Page 62 • Page 63 • Page 65 • Page 79 • Page 80 • Page 83 - Information under the entry heading "[date], 	<p>Section 35(1)(b): I consider the information under heading A to be information that was provided to the Agency in confidence and that disclosure of this information would be contrary to the public interest as it is reasonably likely to impair the ability of the Agency to obtain similar information in future. I consider the stronger public interest lies in the need to protect personal and sensitive information provided by a person or persons to the Agency in confidence for a clinical purpose and in the interests of its patients.</p> <p>As outlined in the notice of decision, I do not consider the information under heading B to have been communicated in confidence. These appear to be Agency officer's making notes as part of their regular work duties.</p> <p>Section 33(1): I consider the page under heading C to contain the personal affairs information of a third party and that for the reasons set out in the Notice of Decision, it would be unreasonable to release the information in the circumstances of this matter.</p>

Annexure 1

Document No.	Date of Document	Document Description	Number of Pages	Agency's Decision	OVIC Decision	OVIC Comments
					<p>[time]" from the 5th line (inclusive) to the bottom of the page</p> <ul style="list-style-type: none"> • Page 84 - All information under the entry heading "[date], [time]" being until the end of the 8th line on the page • Page 85 • Page 90 • Page 100 • Page 128 • Page 134 • Page 136 • Page 148 • Page 149 • Page 176 • Page 224 - Under the heading "From the ED Consultant MO" 	<p>I also note that the Agency deleted various personal affairs information from the entire Document under section 33(1), however the Applicant excluded this exempt information from the scope of the review.</p>

Annexure 1

Document No.	Date of Document	Document Description	Number of Pages	Agency's Decision	OVIC Decision	OVIC Comments
					<p>information in lines 1-3 and the first eight words in line 4.</p> <p>Under the heading "Formulation (including Risk Factors)" information in the 5th line up to and including the 22nd word.</p> <p>B) The information exempted by the Agency under section 35(1)(b) on the following pages is to be released to the Applicant;</p> <ul style="list-style-type: none"> • Page 83 - Information under the entry heading "[date], [time]" lines one to four (inclusive) • Page 84 - Information under the margin heading "[date], [time]" lines one to five (inclusive) • Page 224 - Information under the heading "From the ED 	

Annexure 1

Document No.	Date of Document	Document Description	Number of Pages	Agency's Decision	OVIC Decision	OVIC Comments
					<p>Consultant MO" from the 9th word in the 4th line; and Information under the heading "Formulation (including Risk Factors)" all information in the 4th line; The 23rd and 24th words in the 5th line; and All information in the 6th line.</p> <p>C) I have determined that page 247 is to remain exempt, however I consider the more appropriate exemption to be section 33(1).</p>	